

Kamali (Migration) [2018] AATA 5664 (17 December 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Abdulsalam Fayssal Kamali
VISA APPLICANT:	Mrs Sara Ridani
CASE NUMBER:	1705289
DIBP REFERENCE(S):	OSF2015/054575
MEMBER:	Russell Matheson
DATE:	17 December 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 17 December 2018 at 8:59am

CATCHWORDS

1. *MIGRATION – Partner (Provisional) (Class UF) – Subclass 309 (Partner (Provisional)) visa – no savings from both parties – second marriage for sponsor – no evidence of financial commitments or plans for future – no evidence to indicate genuine and continuing spousal relationship – decision under review affirmed*

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 5F(2)(a), 65
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2 cls 309.211, 309.221

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 22 February 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
6. The visa applicant (the applicant) is a 26 year old female national of Lebanon. She applied for the visa on 24 February 2015 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
7. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because there was limited evidence to show that the parties were in a genuine and continuing spousal relationship. The sponsor seeks review of the delegate's decision. The review applicant appeared before the Tribunal on 14 June 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant.
8. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

9. BACKGROUND

10. The applicant is a 26 year-old Lebanese female who has declared no previous relationships.
11. The sponsor is a 40 year-old Lebanese born Australian male, currently residing in Australia with his brother in law. He has declared one previous relationship, marrying in February 2001 and divorcing in November 2014. There are no children from the relationship.
12. The sponsor married the applicant on 20 December 2014 (execution date) and there are no children of the relationship.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
14. The Tribunal has before it the Department's file relating to the applicant; its own file; and a copy of the Department's decision provided by the sponsor to the Tribunal.
15. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record. _

Whether the parties are in a spousal or de facto relationship

16. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is Australian citizen.

17. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

18. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered in Lebanon at Tripoli, Khodre Assaad, on 20 December 2014. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

19. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is not satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.

20. Financial aspects

21. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
22. The sponsor provided a number of money transfer receipts for the period 1 April 2017 to 20 March 2018 totalling AUD 6,942.89 addressed from himself to the applicant. The sponsor told the Tribunal that the applicant used the money for her day-to-day living expenses. The sponsor told the Tribunal that he was involved in a motor vehicle accident in March 2018 and has not sent the applicant any further money because he is now unemployed and living at his brother in laws residence. The Tribunal accepts that the sponsor provided the applicant with some financial support for the abovementioned period. The sponsor did not provide any evidence of financial support from the time the parties were married in December 2014 until April 2017. The Tribunal finds that there was no financial support provided by the sponsor toward the applicant during this period. The sponsor also said that the applicant's siblings send her money; but he provided no evidence to demonstrate this actually occurs. The applicant provided limited evidence regarding the financial aspects of their relationship, including any evidence of previous or ongoing pooling of financial resources or sharing of day-to-day household expenses. The parties stated that neither one of them is working or has any savings.

23. There is no evidence before the Tribunal that the parties have any joint liabilities or major assets such as real estate together or that they have made any financial commitments or plans. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other.
24. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the sponsor and applicant live in separate countries. The Tribunal finds based on the evidence before it, the financial aspects of the relationship between the applicant and sponsor are not indicative of being in a genuine and continuing spousal relationship.

25. ***Nature of the household***

26. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children, if any, living arrangements of the parties and the sharing of the responsibility for housework.
27. The applicant and sponsor provided evidence that they lived together briefly as a couple when the sponsor was in Lebanon, sharing a house and the responsibilities of a household. The sponsor stated that the applicant is currently moving between his and her parents households. The sponsor told the Tribunal when he travelled to Lebanon in 2015 and 2017 he stayed at his sister's house. The sponsor provided no evidence showing cohabitation with the applicant in Lebanon. The applicant and sponsor have not provided evidence of their future plans and preparations to reside together as spouses in Australia. The applicant and sponsor have not provided any evidence that shows they resided together as genuine spouses in Lebanon or that they have future plans to reside together as spouses.
28. The Tribunal finds that there is insufficient evidence before the Tribunal supporting that the parties shared the responsibilities of a household such as housework. There are no children of the relationship.
29. The Tribunal accepts there are difficulties associated with establishing a joint household and living together for significant periods of time when the parties live in separate countries. The Tribunal places very little weight on this aspect of the relationship.

30. ***Social Aspects***

31. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
32. The sponsor told the Tribunal the first time he met the applicant the parties went to restaurants for dinner, sightseeing and family gatherings. The Tribunal accepts that the parties have socialised together and held a wedding ceremony. The Tribunal also notes that the parties met through an arranged relationship and the sponsor is related to the applicant's mother, therefore it would be expected that they would attend family gatherings together. The Tribunal places moderate weight on the photographic evidence of the social aspects of their relationship. The parties also provided two form 888 statutory declarations from a relative of the applicant and a friend of the sponsor. The statements give very little insight as to the inception and nature of the relationship or any convincing reasons as to why they believe the relationship is genuine and continuing. The Tribunal, after considering the evidence provided by the parties, finds that the relationship is recognised by immediate family and select friends.

33. Based on the evidence provided by the parties, the Tribunal finds there is little supportive evidence that shows that the parties represent themselves to other people as being in a committed spousal relationship or that they are regarded by others as being in a genuine and continuing relationship.
34. Overall, on considering the evidence given by the applicant and sponsor, the Tribunal finds that the parties do not represent themselves as being married to each other in a committed spousal relationship or that they are regarded by others as being in a genuine and continuing relationship. The Tribunal accepts that they plan and undertake some joint social activities together based on the evidence provided. The Tribunal places little weight on the social aspects of the relationship.

35. Commitment

36. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
37. The applicant and sponsor claim to have met through the sponsor's aunt who spoke to the applicant's parents (her relatives) while they were on a visitor visa in Australia. The sponsor's aunt wanted to find the sponsor a partner and suggested the applicant because she knows her family. The applicant made plans to visit the sponsor in Australia since the majority of her siblings live here, but after her visa application was refused, she committed to the sponsor before actually seeing him in person.
38. The sponsor travelled to Lebanon on 7 December 2014. The applicant provided evidence to the Department she made wedding preparations before the sponsor arrived in Lebanon and they spent two days together before registering their marriage on 20 December 2014 and the sponsor returned to Australia in January 2015 after spending a month with his new bride. The Tribunal has considered the duration of the relationship in assessing the commitment of the parties, but notes that the parties have not seen each other for nearly four years since their marriage. The parties provided evidence of online communication showing they remained in touch during separation. The Tribunal accepts that they have been in contact with each other.
39. The parties said they would like to live together near the applicant's siblings and eventually have children. The sponsor said that he is currently unable to work after being injured in a motor vehicle accident. He further stated that he wanted to return to work and work with the applicant in his cleaning business, although she did not like cleaning. The applicant told the Tribunal the parties have the same ambitions and when she comes to Australia she will study English. The parties provide little convincing evidence to the Tribunal that they have made plans for their future and genuinely intend to live together in a spousal relationship.
40. Based on the evidence provided, the Tribunal finds there is little evidence to support that the relationship has been nurtured or that the couple draw any companionship and emotional support from each other at the time of the visa application or time of decision. The applicant and sponsor have not demonstrated any sharing of responsibility for a household. Based on the evidence provided the Tribunal finds that the nature of their household is separate and apart, and indicates that they do not have a genuine and continuing commitment to each other. There is no evidence before the Tribunal that demonstrates the parties believe themselves to be in a long-term relationship.

42. Findings

43. Overall, based on the evidence before it, the Tribunal finds that there is little evidence to show the parties pooled or shared their financial resources, share daily expenses or that they have planned a financial future together. The Tribunal finds that there is no evidence of any joint ownership of real estate or other major assets or any joint liabilities or that one person in the relationship owes any legal obligation in respect of the other.
44. There is limited supportive evidence to show the parties established a joint household or shared the household responsibilities together, or represented themselves to others as being in a spousal relationship. There is little evidence to support that the parties have lived together and shared the responsibility for housework. There is no evidence of any joint responsibility for the care and support of children as there are no children of the relationship.
45. Based on the evidence before it the Tribunal finds there is little supportive evidence to show that the parties present themselves to the wider community as being married to each other and that friends and acquaintances have a sound knowledge of the nature of the relationship. Based on the evidence the Tribunal finds there is very little supportive evidence before the Tribunal to indicate the relationship is socially recognised outside the parties' immediate family members or select group of friends. There is little supportive evidence that the parties plan and undertake joint social activities.
46. The Tribunal accepts that the parties have known each other for nearly four years from the time of their marriage in December 2014. There is little evidence before the Tribunal that the parties had known each other before marrying. Based on the evidence before it the Tribunal finds there is little evidence of them living together or that they draw a degree of companionship or emotional support from each other that is indicative of being in a genuine spousal relationship or that they view their relationship as a long-term one.
47. Overall, having considered all the circumstances of the relationship, the Tribunal finds the weight of evidence does not support a finding the parties are in a genuine and continuing relationship. The Tribunal does not consider the financial, household, social or commitment aspects of the parties' relationship are indicative of a couple with a genuine, mutual commitment to a shared life together.
48. Taking the above into account and considering all of the evidence cumulatively and holistically, the Tribunal is not satisfied the applicant and the sponsor have established that they are in a genuine and continuing relationship or have a mutual commitment to a shared life together to the exclusion of all others or that they are not living separately and apart on a permanent basis.
49. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision. There is no information before the Tribunal that the applicant would satisfy any of the alternate criteria for the grant of the visa.
50. Therefore the applicant does not meet cl.309.211 or cl.309.221.
51. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.
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DECISION

54. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

55.

Russell Matheson
Member

56.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).